

REMARKS

In the final Office Action, the Examiner has withdrawn the rejection of claim 17 under 35 U.S.C. §101 because the claimed invention is directed to non-statutory subject matter. However, the Examiner has maintained rejection of: (i) claims 1, 5-7 and 14-17 under 35 U.S.C. §102(b) as being anticipated by U.S. Patent No. 6,449,647 (hereinafter “Colby”); (ii) claims 2-4, 18-20 and 25 under 35 U.S.C. §103(a) as being unpatentable over Colby in view of U.S. Patent No. 6,112,221 to (hereinafter “Bender”); (iii) claims 8 and 10-12 under 35 U.S.C. §103(a) as being unpatentable over Colby in view of U.S. Patent No. 6,807,156 (hereinafter “Veres”) and U.S. Patent No. 6,981,029 to (hereinafter “Menditto”); (iv) claim 9 under 35 U.S.C. §103(a) as being unpatentable over Colby; (v) claim 13 under 35 U.S.C. §103(a) as being unpatentable over Colby in view of Veres and Menditto as applied to claim 11 above and further in view of U.S. Patent No. 6,772,211 (hereinafter “Lu”); (vi) claims 21-23 under 35 U.S.C. §103(a) as being unpatentable over Colby and Bender in further view of Veres and Menditto; and (vii) claim 24 under 35 U.S.C. §103(a) as being unpatentable over Colby, Bender, Veres and Menditto in further view of Lu.

In this response, Applicants again respectfully traverse the various rejections for at least the following reasons.

With regard to the §102(b) rejection, Applicants again note that MPEP §2131 specifies that a given claim is anticipated “only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference,” citing Verdegaal Bros. v. Union Oil Co. of California, 814 F.2d 628, 631, 2 USPQ2d 1051, 1053 (Fed. Cir. 1987). Moreover, MPEP §2131 indicates that the cited reference must show the “identical invention . . . in as complete detail as is contained in the . . . claim,” citing Richardson v. Suzuki Motor Co., 868 F.2d 1226, 1236, 9 USPQ2d 1913, 1920 (Fed. Cir. 1989). Applicants again respectfully traverse the §102(b) rejection on the ground that the Colby reference fails to teach or suggest each and every limitation of claims 1, 5-7 and 14-17 as alleged.

To reiterate, independent claim 1 is directed to a method of processing a request to at least one server, comprising the steps of: receiving the request; and scheduling submission of the request to the at least one server based on: (i) a quality-of-service (QoS) class assigned to a client from

which the request originated; (ii) a response target associated with the QoS class; and (iii) an estimated response time associated with the at least one server.

The Examiner in formulating the §102(b) rejection of claim 1 argues that each and every one of the above-noted limitations of claim 1 is anticipated by the teachings of Colby. Applicants respectfully disagree.

In characterizing the Colby reference as disclosing a quality-of-service (QoS) class assigned to a client from which the request originated, the Examiner again refers to column 2, lines 55-61 of Colby. The only reference to QoS is that the QoS requirements are implied by the content request. In fact, no where does Colby disclose assigning a QoS class to a client.

The final Office Action (pages 2 and 3) still cites parts of Colby that have nothing to do with assigning a QoS class to a client, and summarily concludes that these parts of Colby “are interpreted” to disclose assigning a QoS class to a client.

Then, in an apparent admission that Colby fails to disclose the subject limitations, the final Office Action (page 3) now raises the argument that the subject limitations are “inherent” in Colby. According to well established law, “[i]nherency does not mean that a thing might be done, or that it might happen, ...; but it must be disclosed, if inherency is claimed, that the thing will necessarily happen.” *In re Draeger et al.*, 150 F.2d 572, 574 (CCPA 1945) (emphasis supplied). Furthermore, the well settled law “requires that inherency may not be established by possibilities and probabilities. The evidence must show that the inherency is necessary and inevitable.” *Interchemical Corp. v. Watson*, 145 F. Supp. 179, 182, 111 USPQ 78, 79 (D. D.C. 1956) (emphasis supplied), *aff’d*, 251 F.2d 390, 116 USPQ 119 (D.C. Cir. 1958).

The fact that Colby states that “QoS requirements [are] implied by the content request” means that QoS requirements may be implied by the content request, and clearly does not mean that QoS classes must be assigned to clients. Thus, an inherency rejection argument is not supported.

Accordingly, it is believed that the teachings of Colby fail to meet the limitations of claim 1.

Independent claims 14 and 17 include limitations similar to those of claim 1, and are therefore believed allowable for reasons similar to those described above with reference to claim 1.

Dependent claims 5-7, 15 and 16 are allowable for at least the reasons identified above with regard to claims 1 and 14. One or more of these claims are also believed to define separately-patentable subject matter over the cited art. Accordingly, withdrawal of the §102(b) rejection of claims 1, 5-7 and 14-17 is respectfully requested.

With regard to the §103(a) rejections, Applicants again note that a proper case of obviousness requires that the cited references when combined must “teach or suggest all the claim limitations,” and that there be some suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art, to combine the references or to modify the reference teachings. See Manual of Patent Examining Procedure (MPEP), Eighth Edition, August 2001, §706.02(j).

Applicants submit that the Examiner has failed to establish a proper case of obviousness in the §103(a) rejection of claims 2-4, 18-20 and 25 over Colby and Bender, in that the Colby and Bender references, even if assumed to be combinable, fail to teach or suggest all the claim limitations, and in that no cogent motivation has been identified for combining the references or modifying the reference teachings to reach the claimed invention.

Claim 18 is directed to a method of processing requests to at least one server, comprising the steps of: assigning at least one client to a quality-of-service (QoS) class from among at least two QoS classes; assigning a response target to at least one QoS class; estimating at least one response time of the at least one server based on one or more requests sent to the server within a given time period; and withholding requests associated with a first one of the at least two QoS classes to allow requests associated with a second one of the at least two QoS classes to meet its response target based on the at least one estimated response time.

The Examiner in formulating the §103(a) rejection of claim 18 argues that each and every one of the above-noted limitations is met by the collective teachings of Colby and Bender. To reiterate, Applicants again explain below how such portions of Colby and Bender fail to teach or

suggest what the Examiner contends that they teach or suggest. While Applicants may refer from time to time to each reference alone in describing its deficiencies, it is to be understood that such arguments are intended to point out the overall deficiency of the cited combination.

The Colby reference does not disclose assigning at least one client to a quality-of-service (QoS) class from among at least two QoS classes, as noted above with regard to claim 1. Also, as explained above, Colby does not support an inherency argument. Furthermore, Bender fails to supplement the above-noted deficiencies.

Accordingly, it is believed that the teachings of Colby and Bender fail to meet the limitations of claim 18.

Independent claim 25 includes limitations similar to those of claim 18, and is therefore believed allowable for reasons similar to those described above with reference to claim 18.

Dependent claims 2-4, 19 and 20 are allowable for at least the reasons identified above with regard to claims 1 and 18. One or more of these claims are also believed to define separately-patentable subject matter over the cited art. Accordingly, withdrawal of the §103(a) rejection of claims 2-4, 18-20 and 25 is respectfully requested.

Applicants again assert that, with regard to claims 2-4, no where does Colby teach or suggest withholding the request from submission to the at least one server when the request originated from a client assigned to a first QoS class to allow a request that originated from a client assigned to a second QoS class to meet a response target associated therewith (as recited in claim 2), determining a throughput of the at least one server; and reducing a request withhold rate to increase throughput of the at least one server (as recited in claim 3), and monitoring a throughput of the at least one server; and varying a request withhold rate to balance the throughput and request response times (as recited in claim 4).

In the final Office Action, the Examiner does not counter this argument, but rather simply recites the original ground of rejection.

Regarding the claims 8 and 10-12 which depend from independent claim 1, Applicants assert that such claims are patentable not only due to their respective dependence on claim 1, but also

because such claims recite patentable subject matter in their own right. Also, Veres and Menditto fail to remedy the above-described deficiencies of Colby.

In the final Office Action, the Examiner seems to ignore various limitations recited in claim 10 (determining dispatch times for requests from a difference between at least one predicted response time of the at least one server and the target response time corresponding to the QoS class of the request; and sending requests to the at least one server based on dispatch times) and merely states that Veres discloses estimating response time, and Menditto discloses a content gateway. There is no explanation as to where in Colby, Veres, or Menditto, that the subject limitations are found. Also, while the Examiner takes Official Notice about acceptable response times, which Applicants challenge, there is no where to be found an explanation as to how all of these assertions add up to disclosing the subject limitations of the claim. The same deficiency exists in the rejection of claim 11 and 12. That is, the final Office Action seems to ignore large parts of the claim language, particularly the claim parts having to do with the QoS classes assigned to the clients.

In view of the above, Applicants believe that claims 1-25 are in condition for allowance, and again respectfully request withdrawal of the various remaining rejections.

Respectfully submitted,



William E. Lewis
Attorney for Applicant(s)
Reg. No. 39,274
Ryan, Mason & Lewis, LLP
90 Forest Avenue
Locust Valley, NY 11560
(516) 759-2946

Date: May 5, 2008